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No. 08-673

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In the Supreme Court of the United States

RICKEY CLARK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The government's Opposition is more notable for what it does not argue than for what it does. The government does not dispute that the circuit courts are divided on the issues raised in the petition or that the circuit split is mature and intractable. Nor does the government argue that this case is an inappropriate vehicle to resolve the circuit split. Instead, the government devotes much of its brief to addressing the merits of the case. Of course, the appropriate time to argue the merits is not now but after this Court grants review. The government devotes the remainder of its brief to erroneous arguments that the acknowledged circuit split lacks "practical importance." Ironically, the government's own arguments unwittingly underscore the profound practical importance of the circuit split.

As the National Association of Criminal Defense Lawyers ("NACDL") demonstrated in its *amicus* brief, drug crime prosecutions dominate the criminal justice system. NACDL *Amicus* Br. at 13-14. Absent this Court's guidance, the circuit courts will continue to disagree as to the burden of proof when a drug quantity finding increases the sentencing range. Unless this Court acts, similarly situated defendants will continue to face vastly disparate sentences based on nothing more than geography. Just as importantly, the circuit courts will continue to be divided over the broader but related question of whether *Apprendi* applies when a defendant is exposed to a higher sentencing range based on judicial fact-finding. The lower courts will also remain divided over how broadly this Court's fractured plurality decision in *Harris* should be interpreted and will continue to question whether *Harris* remains good law.

The government offers no principled reason why this Court should not resolve these important issues. With ten of the twelve circuits adopting the position it favors, it appears that the government would simply prefer to maintain the status quo rather than chance a review on the merits.

I. The Court's Denial Of Prior Petitions Does Not Refute The Need For Review In This Case.

As a threshold matter, the government argues repeatedly that this Petition should be denied because the Court has previously denied petitions purportedly raising the "same question[s]" in the past. Opp. at 5, 11, 15. This argument is meritless.

Petitions cited by the government did not "directly implicate any circuit conflict." Brief of the United States in Opposition to Petition, at 5, *Butterworth* v. *United States*, No. 07-10067 (June 6, 2008); see also Brief of the United States in Opposition to Petition, at 11, *Tidwell* v. *United States*, No. 07-11458 (Nov. 14, 2008). The government has acknowledged that this case presents a clear circuit split. Opp. at 8, 14.

Nor did petitions cited by the government present the "same question" raised here. See, e.g., Brief of Petitioner, at 20-24, *Landers* v. *United States*, No. 05-8774 (Jan. 20, 2006) (seeking review of mandatory minimums in the context of use of prior felony convictions to increase defendant's sentence).

Petitions cited by the government were filed *pro se*. See Brief of Petitioner, *Tidwell*, supra (June 11, 2008); Brief of Petitioner, *Simmons* v. *United States*, No. 05-7336 (Oct. 24, 2005); Brief of Petitioner, *O'Neal* v. *United States*, No. 03-7686 (June 30, 2003).

Petitions cited by the government also predated the seminal decisions in *United States* v. *Booker*, 543 U.S. 220 (2005) and *Blakely* v. *Washington*, 542 U.S. 296 (2004). See Brief of Petitioner, *Goodine* v. *United States*, No. 03-596 (Oct. 16, 2003).

Moreover, this Court has previously denied petitions on *Apprendi*-related issues, only to grant later petitions on those same issues. Compare *Buchanan* v. *Washington*, 537 U.S. 1198 (2003) (denying petition), with *Blakely* v. *Washington*, 540 U.S. 965 (2003) (granting petition characterized in State of Washington's opposition as presenting "the identical issue and argument" presented in *Buchanan*).

In short, this Court's denial of the petitions cited by the government does not refute the need for review in this case.

II. This Court Has Not Limited *Apprendi*'s Application To Cases Where The Sentence Imposed Exceeds The Default Statutory Maximum.

The government argues that because this Court's decisions applying *Apprendi* presented factual circumstances where the sentence imposed exceeded the default statutory maximum, it necessarily follows that *Apprendi* protections apply *only* when the sentence exceeds the default statutory maximum. Opp. at 6-8. The government's limited reading of *Apprendi* is incorrect and, in any case, is a merits-based argument that fails to address whether certiorari is warranted to resolve the circuit split.

Here, a factual finding that the trial court concluded satisfied the preponderance standard, but not the reasonable doubt standard, subjected Clark to a heightened

sentencing range (10 years to life rather than 0 to 20 years) and thereby required the court to sentence Clark to 10 years rather than the court's preferred sentence of 4 years. See Pet. at 7-8. The government cannot point to any decision by this Court holding that no *Apprendi* violation occurred because Clark was only exposed, but not actually sentenced, to a term that exceeded the 20-year default statutory maximum.

Clark has cited language from several of this Court's decisions stating that exposure to an increased sentencing range is sufficient to trigger *Apprendi* rights. Pet. at 16-17. One of this Court's more recent pronouncements is directly on point:

> This Court has repeatedly held that, under the Sixth Amendment, any fact that *exposes* a defendant to a *greater potential sentence* must be found by a jury, not by a judge, and established beyond a reasonable doubt, not merely by a preponderance of evidence.

Cunningham v. *California*, 549 U.S. 270, 281 (2007) (emphasis added).

This language, and the reading of *Apprendi* urged in the Petition, are entirely consistent with this Court's holding in *Duncan* v. *Louisiana*, 391 U.S. 145, 159 (1968) that the defendant's Sixth Amendment right to a jury trial was violated where he was *exposed*, but not *actually sentenced*, to two years imprisonment. Pet. at 19. The government fails even to acknowledge this Court's ruling in *Duncan*.

Rather, the government points to isolated language in support of its narrow view of *Apprendi*. The circuits in the majority rely heavily on a single quotation from *Apprendi* where this Court stated, "[w]e do not overrule *McMillan*. We limit its holding to cases that do not in-

volve *the imposition* of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." *Apprendi* v. *New Jersey*, 530 U.S. 466, 487 n.13 (2000) (emphasis added). See, e.g., *United States* v. *Hernandez*, 330 F.3d 964, 980 (7th Cir. 2003) (*en banc*); *United States* v. *Sanchez*, 269 F.3d 1250, 1262-63 (11th Cir. 2001) (*en banc*); *United States* v. *Aguayo-Delgado*, 220 F.3d 926, 932 (8th Cir. 2000); *United States* v. *Keith*, 230 F.3d 784, 787 (5th Cir. 2000).

Indeed, prior to its decision in *United States* v. *Gonzalez*, 420 F.3d 111 (2d Cir. 2005), even the Second Circuit relied on this language from *Apprendi* to conclude that *Apprendi*'s "prohibition is limited to those sentences actually imposed in excess of otherwise applicable maximums." *United States* v. *Luciano*, 311 F.3d 146, 151 (2d Cir. 2002). The Second Circuit, however, subsequently rejected this narrow view of *Apprendi*, stating that "developments in *Apprendi* jurisprudence suggest that the rule in that case may well reach more broadly than courts had originally understood." *Gonzalez*, 420 F.3d at 128.

Far from undercutting Clark's arguments, the language cited by the government underscores why the Petition should be granted. Circuit courts on each side of the split rely on language from this Court in support of their positions. Only this Court can resolve the confusion among the circuits.

III. The Circuit Split Is Significant.

The government's argument that the split among the circuits lacks "significant practical importance" is unavailing. See Opp. at 10, 13, 14. None of the government's contentions withstands scrutiny.

1. The government argues that the circuit split "has little practical importance outside the context of the imposition of mandatory minimum sentences under 21 U.S.C. 841." Opp. at 10. Even if that were true (which it is not), the government's acknowledgment that the split is important in the context of drug prosecutions involving mandatory minimums demonstrates that this case is worthy of Supreme Court review. As pointed out by the NACDL, drug cases comprise an enormous portion of the federal criminal docket. NACDL *Amicus* Br. at 13. The two circuits in the minority have jurisdiction over approximately one-quarter of this country's population. See U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/ (last visited Mar. 3, 2009). Moreover, given the overwhelming prevalence of mandatory minimum sentences in federal drug cases, see NACDL *Amicus* Br. at 14 (noting that 70 percent of drug convictions result in mandatory minimums), the government's concession that the split has practical importance in those cases unwittingly proves the profound practical significance of this circuit split.

2. The government's argument that the split is not significant because "federal prosecutors now routinely assure that the requisite drug quantity levels are charged in the indictment and submitted to the jury," Opp. at 14, is belied by the facts of this case. Apart from the government's failure to cite any authority for its broad assertion of what prosecutors "routinely" do, the government did not charge Clark with a specific quantity of drugs, nor did it prove drug quantity beyond a

reasonable doubt.[1] Moreover, whatever guidance the Department of Justice may have issued to its prosecutors to ensure that certain facts that may trigger a higher sentence are included in an indictment, such guidance is not always followed. See, e.g., *Garcia-Aguilar* v. *United States Dist. Court*, 535 F.3d 1021, 1024 (9th Cir. 2008) ("The problem here arises from the fact that the U.S. Attorney failed to allege in defendants' original indictments that they were previously removed from the country after being convicted of a felony.").

3. The government seeks to minimize the circuit split by arguing that drug quantity is not a statutory element of the offense in the Ninth Circuit. Opp. at 13 & n.3. The government elevates form over substance. As discussed in the Petition, the Ninth Circuit treats drug quantity as the functional equivalent of an element that must be submitted to the jury and proved beyond a reasonable doubt. Pet. at 20; see also *United States* v. *Thomas*, 355 F.3d 1191, 1194 (9th Cir. 2004)("[D]rug type and quantity are not elements of the offense, *but rather are material facts that must be submitted to the jury and proved beyond a reasonable doubt*. . . . [T]he relevant inquiry is not whether a penalty provision is an element, but rather whether it exposes the defendant to a

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[1] The government's Opposition is misleading in asserting that the prosecution alleged drug quantity in the indictment. Opp. at 14-15. While the government charged a minimum drug quantity for the entire alleged conspiracy in the joint indictment, the indictment failed to charge any drug quantity attributable to Clark. C.A. Separate App. 16-33. Moreover, Clark repeatedly objected to the government's failure to include drug quantity in his indictment or to submit the issue to a jury under the reasonable doubt burden. Pet. at 4-5, 7.

longer sentence than would be authorized by the jury's guilty verdict . . . .") (emphasis added). The government relies on a subheading from *Thomas*, evidently without considering the text beneath it. Compare Opp. at 13 n.3, with *Thomas*, 355 F.3d at 1194 ("Drug Quantity Is Not an Element Under 21 U.S.C. § 841.").

4. The government also attempts to minimize the circuit split by suggesting that the Second Circuit's decision in *Gonzalez* is inapplicable here because Clark "did not seek to withdraw his guilty plea." Opp. at 10. Nothing in *Gonzalez*, however, supports the limitation that the government seeks to impose. See *Gonzalez*, 420 F.3d at 129 ("The *Apprendi* rule applies to the resolution of any fact that would substitute an increased sentencing range for the one otherwise applicable to the case. Because mandatory minimums operate in tandem with increased maximums in § 841(b)(1)(A) and -(b)(1)(B) to create sentencing ranges that 'raise the limit of the possible federal sentence,' drug quantity must be deemed an element for all purposes relevant to the application of these increased ranges."). Nor does the Second Circuit view *Gonzalez* as supporting such a limitation. See *United States* v. *Confredo*, 528 F.3d 143, 153 (2d Cir. 2008) ("[O]ur Court has ruled that *Apprendi* applies not only where an enhanced sentence exceeds the statutory maximum but also where an enhancement exposes the defendant to the risk of a sentence that exceeds the statutory maximum." (citing *Gonzalez*)).

5. The government seeks to downplay the circuit split regarding the interpretation of 21 U.S.C. § 841 by arguing that, prior to *Apprendi*, all twelve circuits "concluded that Congress did not intend for drug quantity to be an element of the offense," and that *Apprendi* "did not alter Congress's intention . . . ." Opp. at 11-12. The government's assertion that the circuit courts were once

in accord is both correct and irrelevant: Regardless of the *past* uniformity of the circuits, there is a split in the circuits *now* that only this Court can resolve.

Under *Apprendi* and its progeny, "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490. Faced with the argument that the Constitution bars treatment of drug quantity as a mere sentencing factor when the defendant is charged with a quantity-based aggravated offense under 21 U.S.C. § 841(b)(1)(A) or -(b)(1)(B) and thereby exposed to an elevated sentencing range, the Second and Ninth Circuits have relied on the doctrine of constitutional avoidance, as well as statutory language, structure, and Congressional intent, in holding that drug quantity must be construed as an element or the functional equivalent of an element. Pet. at 23-24. The circuits are now plainly divided, and only this Court can resolve the circuit split.

6. The government argues that the Ninth Circuit has found *Apprendi* error to be harmless. Opp. at 10. The case cited by the government, *United States* v. *Alvarez*, 358 F.3d 1194, 1212 (9th Cir. 2004), was decided prior to this Court's rulings in *Blakely* and *Booker*. *United States* v. *Zerr*, 171 Fed. Appx. 654, 654 (9th Cir. 2006) (*Alvarez* was decided when *Apprendi* "did not apply to Guidelines calculations made within the statutory maximum."). Prior to *Booker* and *Blakely*, the rule in every circuit was that once the jury had determined guilt, the judge could increase the sentence under the Sentencing Guidelines based on factors determined by a preponderance of the evidence so long as that sentence did not exceed the statutory maximum. *Schardt* v. *Payne*, 414 F.3d 1025, 1035 (9th Cir. 2005) (citing cases). *Blakely* and *Booker*, however, ended this practice. See

Blakely, 542 U.S. at 304 (rejecting the State of Washington's argument that a sentence above the standard range under the Sentencing Guidelines, but below the statutory maximum for the offense, was not an *Apprendi* violation). *Alvarez* embodied the law as it was before *Booker* and *Blakely*, and is no longer good law.

Tellingly, the government does not and cannot argue that the error in this case was harmless. As made plain by the District Judge, Clark's sentence was increased from four years to ten years *only* because drug quantity was subject to proof by a preponderance of the evidence rather than beyond a reasonable doubt. Pet. at 7-8.

IV. The Government Fails To Address Clark's Arguments That Review Of *Harris* Is Warranted.

The government argues that this Court should not reconsider *Harris* v. *United States*, 536 U.S. 545 (2002) because the Court has denied past petitions asking this Court to review *Harris*. As noted above, this argument lacks merit. Section I, supra, pp. 2-3.

Notably, the government does not contest that the circuit courts disagree as to the scope of *Harris* (Pet. at 28-29) nor that at least five circuit courts, three of whom have adopted the position *favored* by the government, explicitly question the ongoing validity of *Harris*. Pet. at 27 n.6. The government also offers no response to the litany of scholars who view *Harris* as an anomaly ripe for review. Pet. at 27-28 n.7; NACDL *Amicus* Br. at 12.

Instead, the government simply argues that this Court's subsequent decisions have not yet "disturbed" the ruling in *Harris*. Opp. at 16. The government's argument for not reconsidering *Harris* is simply that the

Court has not yet reconsidered *Harris*. Plainly, that is not good enough.

Five of the Justices in *Harris rejected* the plurality's reasoning in holding that *Apprendi* does not apply to facts triggering a mandatory minimum. The four dissenting Justices emphatically concluded that "the principles upon which [*Apprendi*] relied apply with equal force to those facts that expose the defendant to a higher mandatory minimum" as well as an increased statutory maximum because "[w]hether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Harris*, 536 U.S. at 579 (Thomas, J., dissenting). Justice Breyer joined in the Court's judgment only because he adhered to his underlying disagreement with *Apprendi*, but he disagreed with the plurality's attempt to distinguish *Apprendi* "from this case in terms of logic." *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment). Thus, the *majority* of the Court believed that the rationale of *Apprendi* applies equally to facts that subject the defendant to a mandatory minimum as well as to facts that expose the defendant to a higher maximum. Since *Harris*, this Court has continued to apply *Apprendi* broadly to "all the facts 'which the law makes essential to the punishment . . . .'" *Blakely*, 542 U.S. at 304. Six years of developing case law and a growing chorus of critical commentary suggests that the time has come to reconsider *Harris*.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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